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No. 83-139

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROSIE LEE PEGUES, ET AL., PETITIONERS

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Hazelwood School District v. *United States*, 433 U.S. 299 ..... 2, 4

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 ..... 2, 3

Ste. Marie v. *Eastern R.R. Association*, 650 F.2d 395 3

Statutes:

Civil Rights Act of 1964, Title VII 42 U.S.C. (& Supp. V) 2000e *et seq.* 1, 2

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Petitioners ask this Court to review the ruling of the court of appeals holding that they failed to establish, except for certain job referrals for a limited period, that they were the victims of unlawful class discrimination on the basis of sex or race by the Mississippi State Employment Service (MSES).

1. Petitioners, four residents of Bolivar County, Mississippi, brought an individual and class action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, against the MSES and the federal defendants—the Secretary of Labor and the United States Employment Service (USES). In their class claims, petitioners alleged that the Bolivar County office of MSES had discriminated against women and blacks in classifying them for employment referrals and in making referrals. The state defendants claimed indemnity from the federal defendants

for any monetary liability for which they might be held liable: MSES contended that the USES was responsible for MSES classification procedures because USES supplied employment aptitude test batteries to MSES and prescribed the policies and procedures under which those tests were to be used in classifying applicants in order to determine employment referrals. After a lengthy trial, the district court entered judgment dismissing all individual and class claims. The court of appeals held that one petitioner, Rebecca Gillespie, had proven her individual claim (Pet. App. 63a-65a), and that petitioners had succeeded in establishing a pattern and practice of race and sex-based discrimination for certain referrals occurring during 1969 and 1970 (Pet. App. 31a-37a). In all other respects, the court of appeals affirmed the district court's decision (Pet. App. 65a).

Because the court of appeals upheld the dismissal of all claims against the federal defendants (Pet. App.49a-59a) and petitioners do not challenge that ruling, no issue directly involving the federal defendants is before this Court. We nevertheless briefly respond to petitioners' contention that this Court should review the court of appeals' ruling that they failed to establish any broad class-wide discrimination in employment classification and referrals by MSES.

2. In our view, the issues raised by petitioners do not warrant review by this Court. Petitioners argue that the court of appeals applied an unreasonably high standard in determining whether MSES violated Title VII simply because MSES was sued as an employment agency, rather than as an employer (Question Presented No. 1; Pet. 24-26). But the court of appeals did not purport to make such a distinction. Rather, its opinion expressly utilizes the legal principles applied to an employer's actions by this Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). See Pet. App. 11a, 20a.

The court of appeals correctly recognized that intentional discrimination may be established through the use of appropriate statistical evidence. *Teamsters, supra; Hazelwood, supra.*[1] The court nevertheless concluded, after a thorough analysis of all of the evidence presented, that petitioners had not proved intentional discrimination, except for certain actions occurring in 1969-1970. Petitioners ask this Court to review the court's evaluation of their statistical presentation.

As Judge Friendly stated in *Ste. Marie* v. *Eastern R.R. Association,* 650 F.2d 395, 397 (2d Cir. 1981), although "[d]ecision turns on the particular history and practices of each employer, and opinions thus have limited precedential value, [t]he guidelines for the determination of disparate treatment cases like this have been * * * clearly laid down by the Supreme Court in a series of cases [citations omitted] * * *." Accordingly, so long as the lower courts follow these guidelines in considering the specific evidence before them, there will ordinarily be no need for this Court to review the lower courts' evaluation of that evidence. There was no departure from the established guidelines here.

This Court, too, has emphasized that the "usefulness [of statistics] depends on all of the surrounding facts and circumstances," *Teamsters*, 431 U.S. at 340. In the instant case, the court of appeals heeded that admonition and

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[1]Although petitioners cast their evidence regarding MSES's classification and referral actions in the disparate impact model, the court of appeals ruled (Pet. App. 18a) that, "[b]ecause the classification and referral practices complained of effectively turn on discretionary decisions, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied." Accordingly, the court "analyze[d] [petitioners'] challenge to the classification and referral systems under the disparate treatment modality" (Pet. App. 19a). This is significant because in a disparate treatment case, plaintiffs must prove discriminatory animus. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. at 335, n.15.

carefully evaluated the evidence with regard to each of petitioners' claims. The court acknowledged (Pet. App. 23a) that petitioners "presented quantitative evidence of the disproportional classification of blacks and women in stereotypic, less renumerative occupations during selected years between 1970 and 1976. [However,] [n]o testimony, lay or expert, was offered to explain the significance of this data, nor was an appropriate test of statistical significance applied." In the absence of such vital evidence, the court was justified in determining that petitioners "[did] not show that race or sex, rather than work preferences, experience, education, and the state of the job market caused the imbalance" (Pet. App. 25a). The court properly noted that statistical evidence does not have to be "precise" (Pet. App. 29a; see *Hazelwood, supra*), but also correctly held that "no valid conclusions regarding the relationship of observed selection patterns to [MSES's] behavior can be drawn absent some minimal framework for analysis" (Pet. App. 29a-30a). The court found that, for the most part, such a framework was lacking here.[2] For example, petitioners' "rudimentary analyses did not purport to gauge the impact [of MSES's referral practices], in numerical terms, upon black and female applicants in Bolivar County by comparison with the appropriate cross-section of the relevant labor market" (Pet. App. 38a).[3] The court also discounted part of petitioners' statistical evidence regarding referrals because

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[2]It did find that petitioners had adequately shown a pattern of sexually segregated referrals to Travenol Laboratories between December 1969 and May 1970 (Pet. App. 34a-36a, 45a-49a).

[3]Although petitioners complain about the requirement that they make a comparison with the relevant labor market (Pet. 25-26), this Court held that such a comparison may be required in appropriate cases. *Hazelwood*, 433 U.S. at 308.

it "fail[ed] to incorporate the primary factor influencing referral—experience" (Pet. App. 39a-40a).[4]

In sum, although petitioners assert that the court relied on "unsupported speculation" that the disparities shown by petitioners' statistics were due to factors other than discrimination (Pet. 33), a reading of the court of appeals' opinion shows that it instead simply refused to disregard the multitude of factors other than race or sex that could cause statistical imbalances. Because petitioners' evidence largely ignored those factors, the court quite reasonably determined that it did not provide an adequate basis for inferring discrimination. That evaluation is one controlled by the facts of this particular case; it does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1983

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[4]Similarly, the court discounted the analysis offered by petitioners' expert because it did "not take into account the relative qualifications of persons referred during the relevant period " (Pet. App. 41a).